No. 00-1642

IN THE

Supreme Court of the United States

BEXLEY CITY SCHOOL DISTRICT, *et al.*,

Petitioners,

v.

JUSTIN KNABLE, a minor, by and through his mother and next friend, MARILYN KNABLE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review a decision issued under the pre-1997 version of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* ("IDEA"), awarding parents reimbursement for the cost of educating their disabled son after the school district refused to convene a conference to develop an individualized education program ("IEP") for the child, failed to offer an IEP that addressed the child's unique needs, and failed to offer a program that was free.

2. Whether this Court should revisit its holding in *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993), that statutory requirements of IDEA applicable to a school district's provision of educational services to eligible children do not apply to placements made by parents following a school district's failure to offer a free appropriate public education.

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OPINIONS BELOW

The opinions of the circuit court and of the district court are attached to Petitioner's Petition at Appendices A and B.

RELEVANT STATUTES AND REGULATIONS

This case requires interpretation of the Individuals with Disabilities Education Act ("IDEA") 20 U.S.C. § 1400, *et seq.*, and its implementing regulations, 34 C.F.R. § 300.1, *et seq.*, as they existed prior to their amendment on June 4, 1997 (Public Law 105-17), and March 12, 1999, respectively. Fed. Reg. Vol. 64 No. 48/Friday, March 12, 1999.[1] Because the Petition for Certiorari provides the text of only two statutory provisions and sets forth none of the regulations, additional applicable statutes and regulations are attached to this Brief in Opposition as Appendices A and B.

COUNTERSTATEMENT

A. NATURE OF THE CASE AND PROCEEDINGS BELOW

This case is an appeal from an administrative proceeding brought under the Individuals with Disabilities Education Act ("IDEA," or "Act"), 20 U.S.C. § 1400, *et seq.* Under this law, disabled children such as the Respondent are entitled to receive a "free appropriate public education" ("FAPE") from their local school district that is designed to meet their unique needs. 20 U.S.C. § 1400(c) (R. App. 1a).[2] A FAPE consists of special

1. All citations in this Opposition are to statutes and regulations as they existed prior to their amendment, unless otherwise noted.

2. Respondent's Appendix will be designated as "R. App.__" and Petitioner's Appendix will be designated as "P. App.__." The Petition for Certiorari will be designated as "Pet.__." All other citations will follow the format used by Petitioner. *See* Pet. 3 n.3.

education and related services which, among other requirements, have been provided at public expense and without charge to the parents, and in conformity with an individualized education program required under 20 U.S.C. §§ 1414(a)(5) and 1401(a)(18)(A) and (D). (R. App. 2a, 5a.)

1. Overview of IDEA procedures.

Petitioner's statement of the case ignores many of the essential requirements of IDEA. The following is a summary of well-settled rules.

School districts are required to identify children suspected to be eligible for services under the Act. 20 U.S.C. § 1414(a)(1). Once identified, children must be evaluated to determine whether they qualify for services. *Id.* Following the evaluation, the school district must provide the parents with written notice either of the child's eligibility or lack thereof. 20 U.S.C. § 1415(b)(1)(C) (R. App. 6a, 7a). Once a child is determined eligible, the district must convene a meeting to develop an Individual Education Program ("IEP") for the child. This meeting must be convened pursuant to notice and within timelines set by law, 34 C.F.R. §§ 300.343(c) and 300.345 (R. App. 8a and 10a), and must be conducted according to procedures defined by statute and regulation. 20 U.S.C. §§ 1414(a)(5) and 1415(a)-(b); 34 C.F.R. §§ 300.343-345 and 300.504-505 (R. App. 4a, 5a, 6a, and 8a-16a). Parental participation in the development of an IEP is an essential element of the process. Parents are to be equal participants with the school district in determining the child's needs and how those needs will be addressed. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205, 209 (1982).

The information derived from a child's evaluation, along with input from the IEP team members, determines the child's unique needs and "present levels of performance" contained in

the IEP. [3] Annual goals and objectives are based on the present levels of performance, and the services to be provided are those necessary to achieve the annual goals and short-term objectives. 34 C.F.R. Pt. 300 App. C, comments 36-43 (R. App. 21a to 26a). Once the content of the IEP is appropriately developed, this content, with due consideration of the "least restrictive environment" requirement of the IDEA,[4] determines the choice of placement. The appropriate placement for a child cannot be determined prior to the development of the IEP, until ". . . after decisions have been made about what the child's needs are and what will be provided." 34 C.F.R. Pt. 300 App. C, comment 5 (R. App. 17a).

The IEP developed through the process set forth above is the *modus operandi* of the IDEA and the vehicle through which a school district complies with the requirement of a FAPE for every eligible child residing within its jurisdiction. *School Committee of Burlington v. Department of Education*, 471 U.S. 359, 368 (1985). As this Court has noted, "[t]he importance Congress attached to these procedural safeguards cannot be gainsaid. . . ." *Rowley*, 458 U.S. at 205. Serious procedural violations or substantive inadequacy of

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3. "Present level of performance" is a statement contained in the IEP that describes the effect of a child's disability on his performance in academic and non-academic areas, that is written in objectively measurable terms, and that is the foundation of his educational plan. 34 C.F.R. Pt. 300 App. C, comment 36 (R. App. 21a).

4. "Least restrictive environment" refers to the requirement that disabled children be educated with non-disabled students unless to do so would be detrimental to the children involved. 34 C.F.R. §§ 300.550-552.

an eligible child's IEP will constitute a denial of FAPE. *Id.* at 206-207. If a school district fails to provide FAPE, parents may place a child in an appropriate private placement at their own risk and sue the school district for reimbursement. *Burlington*, 471 U.S. at 373.

2. Proceedings below.

The parents in this case placed their behaviorally disabled son in a private, residential school, following the school district's failure, over a nine-month period, to offer a free, appropriate public education to the child, to convene an IEP team meeting despite numerous requests by the parents, to develop an appropriate IEP in accordance with law, or to offer a placement that was at no cost to the parents.

The Sixth Circuit agreed that an IEP team meeting was not held within requisite time limits, or at any time. *Knable v. Bexley City Sch.*, 238 F.3d 755, 765-66 (6th Cir. 2001) (P. App. 14a and 18a). *See* 30 C.F.R. § 300.343(c); 34 C.F.R. Pt. 300 App. C, comments 7, 11, 26, 29 and 35 (R. App. 9a, 17a-19a). The Sixth Circuit also held that the school district's violations denied the child educational opportunity and seriously impaired the parents' right to participate in the IEP process. *Knable*, 238 F.3d at 764 (P. App. 14a-15a). The appeals court evaluated the draft education program proposed by Petitioner and ruled that it was procedurally and substantively inadequate. *Id.* at 764-769 (P. App. 13a-26a). The Sixth Circuit found that the program offered was not free because the draft IEP required the Knables to exhaust their own, limited insurance coverage before Bexley would pay for the psychological "related services" Justin, the child, needed to benefit from his education. *Id.* at 769 (P. App. 26a). The Sixth Circuit concluded that FAPE had not been provided.

Regarding the parents' request for tuition reimbursement, the circuit court noted its "broad discretion" under *Burlington* to fashion equitable relief. *Id.* (P. App. 26a). It found that the parents' placement, Grove School, met the standard of appropriateness this Court enunciated in *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 11 (1993): "[W]hen a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits.' " *Knable*, 238 F.3d at 770 (citations omitted in original) (P. App. 27a). The Sixth Circuit ordered tuition reimbursement and remanded the case to the district court for determination of the "appropriate and reasonable level of reimbursement that should be required." *Id.* at 771 (quoting *Florence County*, 510 U.S. at 16) (P. App. 30a).

Petitioner moved for a stay of mandate in light of its plan to file a certiorari petition, but the court of appeals denied the motion for stay and returned the mandate on March 1, 2001. Petitioner moved neither for reargument nor for rehearing *en banc*.

B. FACTUAL BACKGROUND

The factual findings of the Sixth Circuit Court of Appeals are the appropriate basis for this Court's consideration of certiorari. This case was a review of a district court opinion, which in turn was a review of an administrative record. Petitioner's factual statement differs significantly from the Sixth Circuit's factual findings, yet Petitioner does not challenge the legal standard of review applied by the circuit court of appeals. By reformulating the facts, Petitioner is, therefore, challenging

the Sixth Circuit's *application* of the standard of review, " a properly stated rule of law" (Supreme Court Rule 10) for which certiorari will not lie.

Respondent disagrees with Petitioner's Statement of Facts and will address its inaccuracies in the context of the reasons for denying the petition.

REASONS FOR DENYING THE PETITION

I.

THE CIRCUITS ARE NOT IN CONFLICT OVER STANDARDS FOR REIMBURSING PARENTS FOR UNILATERAL PLACEMENTS.

The standards for reimbursing unilateral parental placements were established in *Burlington*, and are uniform in all circuits. Tuition reimbursement may be awarded if the school district fails to offer the child a free appropriate public education in a timely manner, and the parents place the child in an appropriate private school.

As this Court noted in *Burlington*, an award of tuition reimbursement is an exercise of the court's equitable jurisdiction under 20 U.S.C. § 1415(e)(2) to "grant such relief as the court determines is appropriate" when resolving disputes arising under IDEA. *Burlington*, 471 U.S. at 374. The Sixth Circuit acknowledged this by stating that "equitable considerations are relevant in fashioning relief under 20 U.S.C. §1415 (e)(2)." *Knable*, 238 F.3d at 771 (P. App. 29a). Courts in all circuits cited by Petitioner,

including the Sixth, consider parental conduct when appropriate in weighing equities and when determining whether and how much tuition reimbursement is due. Such considerations are, however, particular to each case. Petitioner's argument that the circuits disagree over considering parental conduct merely reflects that equitable considerations lead to differing results when the facts of the case are different.

A. The Sixth Circuit correctly determined that the parents had not failed to cooperate.

The Sixth Circuit considered, but did not find evidence of a parental failure to cooperate. Accordingly, the premise of Petitioner's argument — that the Sixth Circuit "completely discounted the parents' actions" (Pet. 14) and that the Sixth Circuit refused "to consider the parents' actions" (Pet. 18) — is incorrect. The Sixth Circuit stated:

> Bexley argues . . . that even if it failed to convene an IEP conference for Justin within the applicable time period, such failure was due to the Knables' lack of cooperation with school officials. Bexley asserts that it was unable to convene a formal IEP conference until the Knables tentatively agreed to a proposed placement for Justin. . . . Bexley thus argues that because the Knables refused to agree with school officials even tentatively about any proposed placements for Justin, the Knables effectively prevented Bexley from convening a formal IEP conference.

> Bexley's argument fails, however. . . . [N]owhere in the regulations is it required that the parents of a disabled child agree with the school district's proposed placement *before* an IEP conference can be held. To the contrary, the regulations expressly provide for the development of an IEP without parental involvement.

Knable, 238 F.3d at 765 (citations omitted, emphasis in original) (P. App. 15a-16a).

The Sixth Circuit's finding that the parents had not failed to cooperate was amply supported in the record. There is no dispute that they readily consented to Bexley's requests to evaluate their child. On November 23, 1993, Justin's sixth grade year, Bexley's evaluation team unanimously agreed that Justin suffered from a "Severe Behavioral Handicap" ("SBH") and was eligible for special education services.[5] (JA 142.) His diagnoses included attention deficit hyperactivity disorder, oppositional behavior, and dysthymia. (JA 121.)

On December 8, 1993, without benefit of an IEP team meeting, Bexley's officials proposed to place Justin at the Hannah Neil Center for Children, a local, SBH treatment program. (JA 142.) The Knables were not enthusiastic about the suggestion of Hannah Neil and asked to see an IEP before making any educational decisions. (JA 144.) Shortly

5. By this time, Justin had been in psychotherapy for several years (JA 120) and had been previously hospitalized in a local psychiatric facility, Upham Hall. (JA 215.) Bexley School staff reported, *inter alia*, that Justin had made threats to kill himself, intimidated others, displayed inappropriate sexual behaviors, and was fascinated with fire. (JA 359, 360.)

thereafter, on December 13, 1993, Justin was admitted to Upham Hall, a psychiatric hospital, for aggressive behaviors at home.[6] (JA 146-147.)

In February 1994, the parents promoted and supported (with Upham Hall's professional services) another attempt at mainstreaming their son back into Bexley's Maryland Elementary School where he had been prior to his hospitalization. (Ex. 105, p. 3; JA 347-348, 410.) There was no IEP, and the springtime attempt at mainstreaming did not work. Justin's behavior deteriorated, and his grades dropped substantially. The Sixth Circuit noted that Justin received F's in writing, spelling and mathematics, D's in reading and social studies and C's in science and health.[7] *Knable*, 238 F.3d 766 at n.4 (P. App. 19a) (JA 242-45).

Throughout and after Justin's sixth grade year, Bexley never convened an IEP meeting even though the Knables consistently asked for IEPs and were available to meet. In addition to the request for an IEP at the December 8, 1993 meeting, they requested an IEP during a meeting on

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6. This was not a "unilateral placement" within the meaning of IDEA, as Bexley claims (Pet. 9), but a hospitalization. The parents did not ask Bexley to pay the cost.

7. Bexley complains (Pet. 15) that the Sixth Circuit failed to give appropriate deference to the hearing officer's finding that Justin made progress in sixth grade, but cites no case for the proposition that a reviewing court must defer to each factual finding a hearing officer makes. Since the Sixth Circuit relied upon this specific evidence of academic and behavioral decline in the record, its rejection of the hearing officer's finding of progress was appropriate. *M.S. v. Yonkers Bd. of Educ.*, 231 F.3d 96, 105 (2d Cir. 2000), *cert. denied*, __ U.S. __, 121 S. Ct. 1403 (Mar. 26, 2001).

December 14, 1993 (JA 396-397), at a meeting on April 6, 1994 (JA 414-415), at a meeting on June 8, 1994 (Tr. 112, 837), and in a July 18, 1994, letter from Mr. Knable to Bexley's Superintendent Tieman. (JA 229.)

The Knables raised the issue of a residential placement throughout the year, but the Sixth Circuit was correct in ruling that this is not evidence of non-cooperation. To the contrary, IDEA and its implementing regulations contemplate that parents will have opinions as to how their children should be educated and that they will "not lack ardor" in promoting their children's interests. *Rowley*, 458 U.S. at 209. *See also* 34 C.F.R. Pt. 300 App. C, comment 26, ("The parents of a child with a disability are expected to be equal participants along with school personnel, in developing, reviewing and revising the child's IEP.") (R. App. 18a.) The federal regulations specify that placement decisions cannot be made until the end of the IEP process. 34 C.F.R. Pt. 300 App. C, comment 5 (R. App. 17a.) Moreover, the regulations contain instructions for measures to follow when the school district and the parent cannot reach agreement at an IEP team meeting. 34 C.F.R. Pt. 300 App. C, comment 35 (R. App. 19a.)

The parents did not take concrete steps towards placing their child at the chosen residential school, the Grove School in Connecticut, until after Bexley had failed to convene an IEP meeting despite at least five requests over a nine-month period. They did not act until after the springtime attempt at mainstreaming had failed.[8] Even after Grove accepted Justin

8. There are several typographical errors in the district court's opinion of *Knable v. Bexley City Sch. Dist.*, No. C2-96-1159, slip op. (S.D. Ohio Sept. 30, 1999), Petitioner's Appendix B. (Cont'd)

on August 18, 1994 (JA 169), Mr. Knable again asked for an IEP prior to enrolling his son. (JA 157-158, 444.) Bexley advised that it was considering the Harding Hospital School and suggested Mr. Knable visit. (JA 158.) He did so on August 22, 1994, and was concerned about Harding's short school day, and about the requirement that he pay $80 per day in therapy costs. (JA 158, 159.) He expressed these concerns to Anne Hyland, Bexley's director of special education, and again asked for an IEP. He also asked if Bexley would pay the cost of a residential placement. (JA 161.)

On September 12, 1994, after the Knables had received the draft IEP which the Sixth Circuit subsequently determined to be substantively inadequate, they accepted Grove's offer of admission by sending a check to guarantee Justin's place in the seventh grade class. (Tr. 893.) The Knables brought Justin to the Grove School on September 12 or 15, 1994. (Tr. 984.) On September 20, 1994, the Knables' attorney wrote to Bexley and requested an IEP meeting. (JA 170, 472; Ex. 130.) A series of settlement meetings, whose content is confidential, ensued. (Tr. 976.) After the meetings failed to produce agreement, the Knables filed for due process in January 1995. Petitioner's assertion (Pet. 10) that the Knables never responded to the draft IEP and did not inform school officials of their decision to send Justin to Grove School prior to due process is incorrect.

(Cont'd)

A significant error occurs on P. App. 40a. The sentence that begins, "On or about August 16 and 17, 1993, Mrs. Knable completed enrollment and student information forms for Grove School, . . ." has an incorrect date. The year was 1994 (JA 427-431.) Another error occurs on P. App. 41a. The sentence that reads, "At the beginning of the 1994-94 school year, Bexley still had not convened an IEP team meeting," should refer to the 1994-95 school year. The Sixth Circuit statement of facts is correct.

The record simply does not support Bexley's assertion that the parents failed to cooperate in the IEP process. To the contrary, the record shows that they tried to make the IDEA process work before taking matters into their own hands.

B. The circuits consistently consider parental conduct in fashioning equitable relief under the Act.

In accordance with *Burlington* and with the circuit court cases cited by Petitioner (Pet. 12-14), the Sixth Circuit will, when the facts so warrant, deny tuition reimbursement. In *Tucker v. Calloway County Bd. of Educ.*, 136 F.3d 495 (6th Cir. 1998), a case in which the parents removed their disabled child and placed him in an out-of-state school without first giving the school district the opportunity to develop an IEP for him, the Sixth Circuit denied reimbursement for the year in question, even though FAPE had not been offered. Similarly, in *Wise v. Ohio Dep't. of Educ.*, 80 F.3d 177 (6th Cir. 1996), the Sixth Circuit denied reimbursement to parents who had placed their children in an out-of-state residential school without first seeking an appropriate IEP from their local school district. The Sixth Circuit reached a different result in *Knable* than in *Tucker* and in *Wise* because the facts were different. The Knables gave Petitioner ample opportunity to convene an IEP team meeting and develop an IEP, and actively sought to participate in that process.

The cases from other circuits cited by Petitioner (Pet. 14) are all factually distinguishable from the case at bar. In *Patricia P. v. Bd. of Educ. of Oak Park*, 203 F.3d 462, 469 (7th Cir. 2000), FAPE could not be provided because the parent did not make the child available for an

evaluation. Accordingly, the parents were denied reimbursement for their unilateral placement. The Knables, in contrast, readily agreed to an evaluation of Justin, and it was conducted without obstruction.

In *Schoenfield v. Parkway Sch. Dist.*, 138 F.3d 379, 381-82 (8th Cir. 1998), FAPE could not be provided because the parents withdrew their child from the public school after one day of attendance without even requesting an IEP team meeting or giving the school time to develop an IEP. Accordingly, the parents were denied reimbursement for their unilateral placement. The Knables, in contrast, repeatedly asked for an IEP and waited nine months for an IEP team meeting that never was convened before placing their child at Grove school. Their child attended school in the district for most of this period. Bexley had ample opportunity to follow the correct procedures but failed to do so.

In *Cain v. Yukon Pub. Sch. Dist. I-27*, 775 F.2d 15, 16 (10th Cir. 1985), the school and the parents agreed that a change in the child's IEP was necessary. They discussed residential placements without making a final decision, and the child's teacher planned a series of tests for the student which would "help the school develop an appropriate program." *Id.* at 17. At this point, the parents withdrew from the IEP process. They did not make the child available for the testing, and led the district to believe that they were placing him in a residential school. Contacts in April and May confirmed this impression. Thus, when the parents appeared at the district the following August 25 to enroll the child, the school was caught off-guard because it hadn't expected the child to be enrolled. It was in this context — failure to make their child available for testing and withdrawal from the IEP process — that the court found the

parents had contributed to the failure to provide FAPE. *Cain* is factually distinguishable from the case at bar because the Knables made their child available for requested testing. Contrary to the parents in *Cain*, the Knables did not withdraw from the IEP process but tried unsuccessfully to make it work.

Roland M. v. Concord Sch. Comm., 910 F.2d 983 (1st Cir. 1990), *cert. denied*, 499 U.S. 912 (1991), also cited by Petitioner, is not on point. The court found that the IEP had provided FAPE to the child, so the parents would not have been entitled to reimbursement under any circumstances. *Id.* at 1000. *Ash v. Lake Oswego Sch. Dist. No. 7J*, 980 F.2d 585 (9th Cir. 1992), is similarly inapposite because the court did award reimbursement to the parents for a unilateral placement on the basis that the school district had not offered FAPE. *Id.* at 589.

The consistency of legal principle between the Sixth Circuit and other circuits serves to underscore that Bexley's Petition is not about the law, but is a reflection of its dissatisfaction with the outcome of the Sixth Circuit's balancing of the fact-specific equities in this case. Absent a true conflict among the circuits, this Court should not grant certiorari.

II.

PETITIONER'S CHALLENGE WILL NOT CHANGE THE CASE'S OUTCOME BECAUSE BEXLEY DOES NOT SEEK REVIEW OF THE SUBSTANTIVE INADEQUACY OF ITS DRAFT IEP

The Petition filed by Bexley never challenges the Sixth Circuit's conclusions that the proposed IEP was inadequate as drafted and that the draft IEP failed to offer a program which was free. Bexley's failure to pose this challenge means that even if Bexley's procedural violations were excusable, the outcome of the case would not change. Certiorari is not appropriate under these circumstances.

In *Rowley*, 458 U.S. at 206-207, this Court developed a two-pronged test for determining the adequacy of an IEP. A reviewing tribunal must first determine whether the school district complied with the Act's procedures, and second, whether the IEP developed through these procedures is substantively adequate. Substantive inadequacies, alone, constitute denial of a FAPE even if there are no procedural defects.

The Sixth Circuit found that Petitioners failed both the procedural and substantive prongs of the *Rowley* test. *Knable*, 238 F.3d at 767 (P. App. 20a, 21a.) Mandatory procedures were not followed, *and* the draft IEP failed to provide a FAPE to Justin. *Id.* at 768-69 (P. App. 20a through 25a.) The IEP generally failed to meet the requirements of 20 U.S.C. § 1401(a)(20) (R. App. A. 3a, 4a), in that it did not include appropriate information about the child's present levels of performance, goals and objectives to be achieved, and the special education and related services to be offered. *See* 34 C.F.R. Pt. 300 App. C, comments 36-43 (Res. App.

21a-26a.) The IEP also failed to describe the evaluations, procedures, tests, records, or reports that Bexley used as the basis for its proposal, as required by 34 C.F.R. § 300.505. *Id.* (R. App. 24a.) Thus, the court could not conclude that the draft IEP was reasonably calculated to provide educational benefit to the child.

The placement offered, moreover, was not free, in violation of 20 U.S.C. § 1401(a)(18) and 20 U.S.C. § 1401(a)(16), (R. App. 1a-2a), which guarantee that special education are to be provided *at no cost to the parents.* The court of appeals, the district court, and the administrative hearing officer all agreed that Petitioner did not offer a "free" education to Justin because the draft IEP required the Knables to pay for "related services" — those services necessary to enable Justin to benefit from his education (20 U.S.C. § 1401(a)(17)) (R. App. 2a) — by exhausting their health insurance to cover the therapeutic costs associated with the program. *Knable*, 238 F.3d at 761, (P. App. 25a).

The Sixth Circuit rejected Bexley's invitation to look outside the four corners of the draft IEP and speculate as to what Bexley could have offered. In doing so, the appeals court relied on 20 U.S.C. § 1415(b)(1)(C) (R. App. 6a-7a), which requires school districts to provide parents with "a formal written offer before either initiating a placement for a disabled child or otherwise providing a FAPE to the child." *Knable*, 283 F. 3d at 768 (P. App. 22a). Citing *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1526 (9th Cir. 1994), the Sixth Circuit noted that the "formal written offer" requirement is "not merely technical, but rather serves the important purpose of creating a clear record of the educational placement and other services offered to the parents." *Id.* The only services that are actually committed to the child are

those listed in this written offer. 34 C.F.R. Pt. 300, App. C, comment 45 (R. App. 26a).[9]

Petitioner has asserted no basis for reviewing the Sixth Circuit's ruling that its consideration of the substantive appropriateness of the IEP could be based solely on the document itself. Petitioner presents no conflict among the circuits on this issue or the on the issue of a *free* placement. Thus, the Sixth Circuit's conclusion that a substantively appropriate IEP was not offered is final, and further review of the circuit court's other reasons for finding a denial of FAPE would not be a judicious use of the Supreme Court's resources.

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9. The Sixth Circuit was correct in finding that the parents did not have a meaningful role in formulating the IEP because there never was an IEP meeting or an IEP. Bexley's argument to the contrary (Pet. 15) is erroneous. The district court's suggestion that there was an IEP was a mixed question of law and fact which was properly reviewed *de novo*. *Tucker v. Calloway County Board of Educ.*, 136 F.3d 495, 503 (6th Cir. 1998).

III.

THE CIRCUITS ARE NOT SPLIT ON WHETHER A LEAST RESTRICTIVE ENVIRONMENT REQUIREMENT APPLIES TO PARENTAL PLACEMENTS

A. The decisions regarding the application of the LRE requirement of the IDEA are consistent among the circuits and in accordance with this Court's decisions in *Burlington* and *Florence County.*

Petitioner has not identified any ruling by a court of appeals holding that the requirement of education in the least restrictive environment ("LRE")[10] is a bar to reimbursement when a school has failed to provide FAPE and parents have made a unilateral placement that is otherwise appropriate. Bexley's assertion of a conflict among the circuits on this issue (Pet. 23-26) is merely identifying a difference in the application of a properly stated rule of law that is not a basis for certiorari.

1. There is no conflict with the Second Circuit.

In *M.S. v. Yonkers Bd. of Educ.*, 231 F.3d 96 (2d Cir. 2000), *cert. denied*, __ U.S. __, 121 S. Ct. 1403 (Mar. 26, 2001), the Second Circuit did not, as Petitioner asserts, apply the LRE requirements of 20 U.S.C. § 1412(5)(B) as an absolute bar to reimbursement for unilateral placements. To the contrary, the Second Circuit stated, "we recognize that parents seeking an alternative placement may not be subject to the same mainstreaming requirements as a school board," and cited the Sixth Circuit's opinion in *Cleveland Heights-*

10. 20 U.S.C. § 1412(5)(B).

University Heights City Sch. Dist. v. Boss, 144 F.3d 391, 399-400 (6th Cir. 1998). There is no conflicting legal principle here; the Second Circuit followed the Sixth Circuit rule.

Reference to other Second Circuit decisions further clarifies the consistency between the circuits. In *Muller v. Committee on Special Educ.*, 145 F.3d 95 (2d Cir. 1998), the Second Circuit awarded tuition reimbursement for a private school notwithstanding the school district's argument that the private school was not the least restrictive environment because

> the District failed to provide . . . [the child] with an appropriate IEP under the IDEA that would allow her to continue her public school education, and, thus, the Mullers had no alternative but to unilaterally place her in a private facility.

Id. at 105. Similarly, In *Briggs v. Bd. of Educ.*, 888 F.2d 686, 692 (2d Cir. 1989), the Second Circuit approved a segregated placement, stating "we are mindful that the presumption in favor of mainstreaming must be weighed against the importance of providing an appropriate education to handicapped students."

Both circuits recognize that the exercise of equitable authority frequently defies rigid rules. In this regard, the *M.S.* court stated that LRE "may be considered by the hearing officer in determining whether the placement was appropriate," *M.S.*, 231 F.3d at 105. Similarly, the *Knable* panel concluded that a court should not assume that placements in private schools for disabled children *automatically* violate IDEA's LRE requirement. *Knable*, 238

F.3d at 770, (P. App. 28a.) Both circuits allow for the exercise of discretion in designing remedies under 20 U.S.C. § 1415(e)(2) to meet the unique needs of a child. Neither circuit makes the LRE rule an absolute bar to reimbursement for an otherwise appropriate unilateral placement.

Bexley's ignores the significant factual differences in asserting (Pet. 24) that the Sixth Circuit would have denied tuition reimbursement to the Knables if it had applied the Second Circuit rule. In *M.S.*, the child did not make progress in the private placement. *M.S.*, 231 F.3d at 104. His reading level did not improve and his spelling level declined. By contrast, in *Knable*, the Sixth Circuit found:

> Justin made significant educational progress during his two years at Grove School. The record indicates that the frequency of Justin's inappropriate behavior significantly decreased during his first year at Grove and his grades improved dramatically.

Knable, 238 F.3d at 770, (P. App. 27a-28a). The result in the two cases differed only because the facts differed.

2. There is no conflict with the Seventh Circuit.

Without explaining how the Seventh Circuit's tuition reimbursement standards conflict with the Sixth Circuit's approach, Petitioner cites *Bd. of Educ. of Murphysboro v. Illinois State Bd. of Educ.*, 41 F.3d 1162 (7th Cir. 1994). Like the Second Circuit's decisions in *M.S.*, *Muller*, and *Briggs*, *Murphysboro* is consistent with *Knable*. The Seventh Circuit found that parents were entitled to reimbursement for the unilateral placement of their son because the school

had failed to offer FAPE. *Murphysboro* 431 F.3d at 1169. In arriving at its decision, the *Murphysboro* court also rejected the LRE argument propounded by the school district:

> The mainstreaming requirement was developed in response to school districts which were reluctant to integrate mentally impaired children and their non-disabled peers. It was not developed to promote integration with non-disabled peers at the expense of other IDEA educational requirements and is applicable only if the IEP meets IDEA minimums.

Id. at 1168. Under either the Seventh or the Sixth Circuit rule, the LRE requirements in 20 U.S.C. § 1412(5)(B) is not applicable to parental placements.

Petitioners are incorrect in asserting that Bexley's proposal of Harding Hospital School distinguishes *Murphysboro* from *Knable*. In neither case did the school offer the child an adequate program. In *Knable*, the program offered was not even free. *Knable*, 238 F.3d at 767-69, (P. App. 25a-26a).

3. The Supreme Court has already established rules for reimbursing parental placements.

In ruling that IDEA's LRE provision is not directly applicable to unilateral parental placements, the circuits have followed two prior decisions of this Court holding that IDEA provisions governing school districts do not apply to parents. In *Burlington*, this Court held that IDEA's provision requiring school districts to maintain a child's current educational placement ("stay-put") pending due process

review, 20 U.S.C. § 1415(e)(3), is inapplicable to parents who make an appropriate unilateral placement following denial of FAPE. *Burlington*, 471 U.S. at 374. In *Florence County*, this Court held that a parent can be reimbursed even if the unilateral placement does not meet other statutory requirements in 20 U.S.C. § 1401(a)(18) pertaining to provision of FAPE. 510 U.S. at 13-14. The analytical framework has been clearly established; there is no need to revisit this framework as applied to the issue of LRE.

B. The case at bar presents no compelling LRE question.

The record in this case is not a proper vehicle to review the applicability of LRE to unilateral placements. Harding Hospital School proposed by Bexley was, in the words of the school's director, Jan Yore, a "very restrictive" placement. (Tr. 1039.) Had Justin attended Harding, he would have been in a separate class in a segregated facility on the grounds of a psychiatric hospital. (Ex. 6.)

The real dispute was over whether a residential placement was necessary to allow Justin to benefit from his education. In this regard, the appeals court had before it substantial, credible, professional evidence that Justin required a residential placement. (JA 172-173.) Dr. Kathleen Quinn, a board-certified child, adolescent, adult, and forensic psychiatrist (Tr. 292, 296; Ex. 114) on the staff of the Cleveland Clinic Foundation, who evaluated Justin and the Grove School, and who visited Harding Hospital School, testified that a residential placement was necessary for Justin to benefit from his education. He required a 24-hour program that would provide a consistency of response to contain him behaviorally and emotionally. (JA 172.) She noted that he had been out of control and failing educationally for at least

one calendar year, and that outpatient intervention had not stopped the process. (JA 173.) Dr. Quinn did not testify that Justin would have benefitted from Harding Hospital School as Bexley asserts. (Pet. 12.) To the contrary, her statement was that Harding did not have the necessary ingredients to allow Justin to progress in the classroom education sense. (Tr. 413-414).[11]

The Sixth Circuit's exercise of its discretion to award the parents tuition reimbursement was appropriate and does not require further review.

IV.

THIS CASE LACKS FAR-REACHING IMPLICATIONS BECAUSE IDEA WAS AMENDED AFTER THE ADMINISTRATIVE HEARING

Review by this Court is generally reserved for cases with significant implications. This case presents no such implications because IDEA and its implementing regulations were prospectively amended in 1997, approximately two years after the Knables' due process hearing. Contrary to Bexley's assertion (Pet. 2 n.2), the amendments to IDEA do change the substance of the statutes governing the tuition reimbursement issue. IDEA now explicitly provides, at 20 U.S.C. § 1412(a)(10)(C)(ii) (1997), that reimbursement

11. Harding Hospital School lacked the consistency that Justin needed for an additional reason. Harding School experienced financial difficulties during the 1994-95 school year (Tr. 347, 348), and had closed by the end of the school year. (JA 186.) Harding Hospital School had ceased to exist by the time of the hearing on this matter. (JA 186.) According to Harding's director, Jan Yore, closure caused severe problems for the children in the program. (JA 207.)

for a private school placement is available "if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment."

Subject to certain exceptions contained in 20 U.S.C. § 1412(a)(10)(C)(iv) (1997), the new statute provides guidance as to those situations where reimbursement may be denied or reduced; *e.g.* when appropriately informed parents fail to give designated notice of the intent to unilaterally place, when they fail to make their child available for an evaluation, or "upon a judicial finding of unreasonableness with respect to actions taken by the parents." 20 U.S.C. §§ 1412(a)(10)(C)(iii)(I)(aa) and (bb); (C)(iii)(II); and (C)(iii)(III)(1997).[12] The newly amended statute continues IDEA's rule that school districts must educate children in the least restrictive environment [20 U.S.C. § 1412(a)(5)(A) (1997)], but the new law does not extend the rule to bar reimbursement for placements made by parents when the school district fails to provide FAPE.

The Sixth Circuit considered whether the new IDEA provisions were applicable in this case, and ruled that they were not because they do not have retroactive effect. *See Knable*, 238 F.3d at 762 n.2, *citing Tucker*, 136 F.3d at 500-01, (P. App. 9a n.2). Petitioner has not argued otherwise. Thus, were there to be further review, it would be without reference to current, statutory law and would have limited application.

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12. The Department of Education promulgated regulations under the statute on Friday, March 12, 1999. Fed. Reg. Vo. 64, No. 48, p. 12406. *See* 34 C.F.R. § 300.403 (1999).

The statutory clarifications address any argument Petitioner might have had that the Supreme Court should accept certiorari and provide guidance to the circuits. Congress has spoken and additional guidance by this Court should await conflicts, if any, among circuit courts interpreting the new statutory provisions.

V.

THIS CASE DOES NOT RAISE NOVEL ISSUES ON COSTS OF SPECIAL EDUCATION

The issue of excessive cost is not presented by this record. Although Grove School did cost $51,300 for a twelve month program (or $38, 475 for nine months), Bexley fails to consider that the program it proposed was also quite expensive. The cost of Harding Hospital School was $80 per day for the educational program, plus $80 per day for the therapeutic program. (JA 203; Tr. 1036), *Knable*, 238 F. 3d at 761, (P. App. 6a). For 180 days of school, a nine-month program, Harding would have cost $28,800.[13] This does not include the cost of psychiatric hospitalization, which was an integral part of Harding's behavioral program. (Tr. 1031, 1032.) Though Bexley wanted to contain its costs by shifting the payment for therapeutic services to the Knables' insurance, this would have reduced insurance benefits otherwise available to Justin and the Knable family. The tribunals below were unanimous that this

13. A nine month figure is used for comparison purposes only. In fact, Grove was a year-round program, and, as Bexley's expert conceded, to receive a FAPE, Justin needed a year-round program even had he attended Harding. (Tr. 711-712.) Since Bexley's proposed IEP did not specify what "extended school year services" ("ESY") it was going to provide, Respondent is unable to make a twelve-month comparison.

was a denial of a "free" program as the IDEA requires, and that all costs of the program had to be borne by Bexley.

This Court has not found cost issues to be dispositive, even where substantial costs are involved:

> There is no doubt that Congress has imposed a significant financial burden on States and school districts that participate in IDEA. Yet public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims.

Florence County, 510 U.S. at 15; *see also Garret F. v. Cedar Rapids Comm. Sch. Dist.*, 526 U.S. 66, 77 (1999) ("The District may have legitimate financial concerns, but our role in this dispute is to interpret existing law.")

In remanding the case to the district court, the *Knable* court specifically addressed Bexley's continuing complaint about costs and directed the lower court to follow this Court's guidance from *Florence County*, namely to "consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required." *Knable*, 238 F.3d at 771 (citations omitted) (P. App. 30a.) The matter is not ripe for review on the issue of costs.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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